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IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF 304 UNITED KINGDOM AND EUROPEAN PARLIAMENTARIANS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 304 United Kingdom and European parliamentarians, including 220 current or former Members of the Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland and 84 current or former Members of the European Parliament (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

Amici are drawn from all across Europe, both geographically and politically. The *amicus* group spans the political spectrum and includes senior figures from all the major political parties in the United Kingdom, including former Cabinet Ministers. The group also includes five former judges of the highest court in the United Kingdom, senior lawyers, eleven Bishops of the Church of England, and a former Vice President of the European Commission.

Amici filed a brief in support of Mr. Hamdan in the courts below and also supported Mr. Hamdan's petition for a writ of certiorari before judgment to the Court of Appeals.[2] *Amici*, despite their divergent political positions, share a common view that it is important to the international legal

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The full brief filed with the District Court is available at http://www.law.georgetown.edu/faculty/nkk/documents/271europeanmembersofparliament.pdf. The brief filed with the Court of Appeals is available at http://www.law.georgetown.edu/faculty/nkk/document/cadc.britseu.pdf.

order that, even when faced with the threat of international terrorism, the United States abides by international humanitarian law and human rights law. In each of their previous filings, *amici* have reaffirmed the relevance of international law to the treatment to be accorded to detainees such as Mr. Hamdan. The *amicus* brief in the Court of Appeals specifically endorsed the determination by the District Court that Mr. Hamdan is entitled to the protection of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 (the "Geneva Convention"). *Amici* have also consistently advanced the view that certain specific aspects of the military commission system as currently established contravene international law as reflected in such instruments as the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, and the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

Amici believe that it undermines the political and moral authority of the United States and damages the rule of law in a troubled world if the United States, contrary to its long tradition, fails to uphold the international standards that it has been so instrumental in creating. The damage is all the greater when, as did the Court of Appeals, the United States denies that these standards even apply to its conduct.

SUMMARY OF ARGUMENT

Amici wish to express a view on the question of the scope and enforceability of the Geneva Convention as stated in Mr. Hamdan's Petition for a Writ of Certiorari (the "Petition"). Although *amici* have joined issue before on the precise question of the application of the Geneva Convention to Mr. Hamdan, and if this Petition is granted would seek to do so again, at this stage, when the Court is considering

whether to grant the Petition, *amici* focus on two broader aspects of the decision below that warrant immediate action by this Court.

First, this Court should act at the earliest opportunity to reaffirm the United States' commitment to the rule of law, and to international law in particular.

The Court below, having determined that Mr. Hamdan could not enforce the Geneva Convention in the courts of the United States, *Hamdan* v. *Rumsfeld*, No. 04-5393, slip op. at 13 (D.C. Cir. July 15, 2005) (a holding on which *amici* express no view), then reached out to determine that, in any event, one way or another, that treaty had no application to Mr. Hamdan and those like him, *id.* at 13-16. The Court of Appeals declined to address the question whether the military commission system complied with the standards laid down in the Geneva Convention, and it did not consider the application to Mr. Hamdan's situation or the enforcement by him of rights established by any other international legal norms. *Id.* at 16-17.

Any implication that the Court of Appeals' holding that Mr. Hamdan lies outside the *protective* scope of international law means that, with respect to its treatment of him, the United States—or any State similarly situated, including those prosecuting US citizens in the reversed circumstances—lies outside of the *prescriptive* scope of international law must be urgently opposed. Undermining the rule of law, condoning the assertion that international law ignores the treatment of terrorist suspects, poses as much a threat to a society founded on the rule of law as any terrorist outrage. By granting this Petition and reaffirming the United States' commitment to the rule of law, including international law, the Court can and should dispel this threat.

Second, this Court should act now to ensure the legitimacy of the military commission system as a matter of international law.

Amici observe that, although the District Court found that aspects of Mr. Hamdan's treatment contravened international law, the Court of Appeals did not engage with that question, leaving a significant question mark over the legitimacy of the military commissions as a matter of international law. The Court's silence is unfortunate. The compatibility of the military commissions with international law is of critical importance internationally and is the *raison d'être* of this *amicus* group.

The military commission trials may well proceed, but, if they do so, it should be free from the uncertainty concerning their legitimacy, as a matter of international law, that has overshadowed this aspect of the United States' prosecution of the war on terror. By granting this Petition, and authoritatively applying relevant international standards to the military commission system *before* any further violation of international law occurs, this Court can and should dispel that cloud.

For both of these reasons, this Court should act promptly to reassert the United States' commitment to the rule of international law and to establish rules consistent with international law by which the United States will proceed in these troubled times.

ARGUMENT

I. The Court Should Reaffirm The United States' Commitment To The Rule Of International Law.

In supporting Mr. Hamdan's Petition, *amici* would first emphasize to this Court two extraordinary and regrettable implications of the Court of Appeals' ruling:

(1) that there are individuals that lie effectively outside the scope of the protection of international law and in respect of whom international law imposes no restraint upon those States in whose custody they are; and (2) concomitantly, that there are enterprises in which the United States (and other States) may engage abroad without being subject to the strictures of international law. It is these conclusions that the *amici* have come together to oppose, and upon which they now urge this Court's authoritative guidance.

For reasons which are expressed in the brief filed by *amici* with the Court of Appeals and which will not be repeated here, the Court of Appeals' holding in respect of the scope of the Geneva Conventions is itself contrary to persuasive international legal authority. See, e.g., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 ¶ 4339 n.2 (Yves Sandoz et al. eds., 1987); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.) 1986 I.C.J. 14, 114 (Judgment of June 27); *Prosecutor* v. *Tadic*, Case No. 160 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Oct. 2, 1995). These authorities were not addressed at all in the Court of Appeals' opinion.

The outcome is, for Mr. Hamdan, of enormous personal significance: he faces the prospect of being cast outside the legal order, into a shadow world where neither the Constitution nor the Laws of the United States nor the rules of international law specifically applicable to individuals caught up in armed combat, nor apparently even the rules of international law relating to fundamental human rights, afford him any appropriate protection whatsoever.

Moreover, the Court of Appeal's opinion does not explain how Mr. Hamdan could be subject to legal responsibility for alleged violations of the law of war (since this is the basis of the claims against him) whilst at the same

time that he is denied any status under that law that would govern the treatment to which he may be subjected. No state can so pick and choose amongst the burdens and benefits of a legal regime for reasons of logic, fairness and the uniform application of the rule of law.

For the community of liberal democracies, committed to the rule of law, the stakes are equally high. This case boils down to the simple, but crucial, question of whether the system of international legal norms that purport to restrain the conduct of States vis-à-vis individuals within their power will survive the terrorist threat. Lord Hoffman, in the House of Lords, painting the analogous stark choice the United Kingdom faced when deciding on the laws on the detention of terrorist suspects said: "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for [this Court] to decide whether to give the terrorists such a victory." *A. and Others* v. *Secretary of State for the Home Department* [2005] H.L.L.R. 1, 53 (per Lord Hoffman).

This case can thus be seen as one battle in the war between the evil logic of terrorism and the bedrock principles that individuals are entitled to fair and humane treatment, that they should be treated equally before the law, and, crucially, that the actions of all States are subject to the rule of law—principles which American and coalition soldiers today fight to uphold in Afghanistan, Iraq and elsewhere. If the Court of Appeals' determination that international law offers no protection to individuals such as Mr. Hamdan is the last word on this question, *amici* greatly fear that the lesson that will be drawn by the larger world is that the evil of terrorism has proved more than a match for our principles. Moreover, if we do not today defend the vitality of those principles, we not only undermine an important safeguard for our own soldiers

on the battlefield, we threaten the very values for which they are fighting.

For these reasons, this Court should act now to reaffirm the vitality and relevance of the international legal standards governing the treatment of individuals such as Mr. Hamdan to which the United States has pledged itself.

II. The Court Should Ensure The Legitimacy Of The Military Commission System As A Matter Of International Law.

This case presents serious issues of international law that warrant, and indeed require, authoritative determination in a considered judgment.

As troubling as any error of law or logic, though, is the fact that, by the expedient of deeming the Geneva Convention not to apply and by declining to consider the argument that the process being contemplated violated international law, the Court of Appeals was able to remain silent on the very question that has motivated the participation of *amici* in these proceedings to date and held the attention of the wider world: whether the military commissions are consistent with international law. From the perspective of the *amici* and, we would respectfully suggest, observers of the United States around the world, this is the key question, and this question remains without a definitive answer. The only court actually to have confronted Mr. Hamdan's international law claims, the District Court, in fact found them decisive. The Court of Appeals was silent. It now falls to this Court to give these claims the fair consideration they require.

The Court should grant the Petition, if for no other reason, to dispel continuing doubts about the legitimacy of the military commission process. The decision of the Court

of Appeals has cleared the way for the military commission trials to proceed. But, by avoiding the central issue of the legitimacy of that process, it has not removed the festering doubts as to the legality of those trials.

It is for this reason that *amici* urge the Court to grant the Petition now, rather than, as the Court of Appeals has suggested, continuing to subject Mr. Hamdan and others to confinement and trial in conditions that do not clearly comport with the United States' international legal obligations. Until this issue of the legality of all aspects of the military commission process is finally and authoritatively addressed, trials will proceed under a cloud and the legitimacy of the military commission process will continue to be called into question, as will the commitment of the United States to the rule of law. This in turn will undermine the legitimacy of the United States' leadership in the war on terror at a time when the nations united in that struggle can ill afford dissension.

CONCLUSION

Amici appreciate that this Court regularly confronts issues of life and death, of high principle, and of hard compromise. Seen from the perspective of those who share the United States' long-standing commitment to the rule of law, though, it is difficult to imagine an issue that goes more fundamentally to the very enterprise of law itself than that presented in Mr. Hamdan's Petition. To observers outside the United States, the Supreme Court of the United States has long embodied and upheld the United States' commitment to the rule of law. For this reason, it is not only appropriate, but vital, that this Court take the opportunity presented in this Petition to reaffirm that commitment and ensure the legitimacy of the process to which Mr. Hamdan and others in U.S. custody will be subjected.

Respectfully submitted,

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APPENDIX

APPENDIX

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House of Lords
Rt Hon the Lord Ackner
The Lord Ahmed
The Lord Alderdice
Rt Hon the Lord Archer of Sandwell, QC
The Lord Avebury
The Lord Berkeley
The Lord Bhatia, OBE
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The Lord Bowness, CBE, DL
The Lord Brennan, QC
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Rt Hon the Lord Brittan of Spennithorne, QC
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Rt Hon the Lord Browne-Wilkinson
The Lord Campbell of Alloway, QC
The Lord Carlile of Berriew, QC
Rt Hon the Lord Carlisle of Bucklow, QC, DL
The Lord Clarke of Hampstead, CBE
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The Lord Corbett of Castle Vale
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The Lord Goodhart, QC

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The Lord Grenfell
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Gary Titley, MEP
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